

REMARKS

According to the Final Office Action, claims 1, 7, 9, 11, 13 and 23 are rejected under 35 USC 101 as allegedly directed to non-statutory subject matter. In response, claim 1 is amended to point out the claimed method is processor-based. The support for this amendment can be found, for example, in Figure 1 and on page 6, lines 15 – 23 of the instant specification. No new matter had been added. In view of this amendment, withdrawal of the rejection is respectfully requested.

Claims 7, 9, 11, 13 and 23 are also allowable by virtue of their dependency from claim 1.

In the Final Office Action, the Examiner set forth various reasons for allowance and made certain allegations pertaining to claims and/or references.

While Applicant wishes to thank the examiner for indicating allowability of claims 15 and 24, Applicant does not concede, acquiesce or admit the positions taken in the examiner's statement of reasons for allowing claims 15 and 24.

It is further submitted that the record of the prosecution *as a whole* makes clear the reasons for allowing a claim or claims. Namely, the examiner's actions and the applicant's replies during the prosecution made evident the reasons for allowance, satisfying the "record as a whole" proviso of the rule. The examiner's actions clearly pointed out the reasons for rejection and the applicant's reply explicitly presented reasons why claims are patentable over the reference. Hence, it is believed that the reasons for allowance were evident from the record, and no statement was necessary.

As further explicitly stated in MPEP 1302.14, it is improper to use a statement of reasons for allowance to attempt to narrow a claim by providing a special definition to a claim limitation which is argued by Applicant, but not supported by a special definition in the description in cases where the ordinary meaning of the term in the prior art demonstrates that the claim remains unpatentable for the reasons of record, and where such claim narrowing is only tangential to patentability. Cf. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 741, 62 USPQ2d 1705, 1714 (2002).

Still further according to MPEP 1302.14, the examiner's statement of reasons for allowance is the personal opinion of the examiner as to why the claims are allowable. In accordance with the *Festo* court, the examiner's statement should not create an estoppel, and only applicant's statements can create an estoppel. The failure of applicant to comment on the

examiner's statement of reasons for allowance should not be treated as acquiescence to the examiner's statement. Any inferences or presumption are to be determined on a case-by-case basis by a court reviewing the patent, the USPTO examining the patent in a reissue application or a reexamination proceeding, the Board of Patent Appeals and Interferences reviewing the patent in an interference proceeding, etc.

An earnest effort has been made to be fully responsive to the examiner's correspondence and advance the prosecution of this case. In view of the above amendments and remarks, it is believed that the present application is in condition for allowance, and an early notice thereof is earnestly solicited.

Please charge any additional fees associated with this application to Deposit Account No. 14-1270.

Respectfully submitted,

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